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13 IN THE SUPREME COURT OF THE STATE OF ARIZONA

14
15 IN THE MATTER OF:)
16)
17 PETITION TO AMEND) No. R-12-0036
18 RULE 7.6, ARIZONA RULES)
19 OF CRIMINAL PROCEDURE) REPLY TO COMMENT OF DEPUTY
20) PIMA COUNTY ATTORNEY THOMAS
21) RANKIN
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23

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25 I
26 INTRODUCTION

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Petitioner begins this Reply by expressing his fondness and respect for his "Old Pueblo" dueling partner, Thomas Rankin. You will not find a nicer guy, nor more knowledgeable attorney in the field of "bond forfeiture" law than Mr. Rankin. Having said that, however, it is with profound sadness that Petitioner notes that Mr. Rankin, has, as will be discussed in more detail infra, turned to the "dark side." By that Petitioner means Mr. Rankin has now adopted the philosophy as espoused in the Comment of the Arizona Prosecuting Attorneys' Advisory Council. That is, "the only good bond is a completely forfeited bond" no matter if the defendant is either apprehended and returned prior to the entry of the bond forfeiture judgment, or if the defendant can and will be returned

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3 because he is locked up in a sister state. (c.f. pages 1-3
4 of the Reply to the Comment of the Arizona Prosecuting
5 Attorneys' Advisory Council filed May 31, 2013.)

6 Petitioner can avow that he has had numerous bond
7 forfeiture cases with Mr. Rankin stretching back to the
8 1990's and his "turn to the dark side" occurred during
9 the period discussed in the Introduction to his Comment.

10 II
11 STATISTICS EVIDENCING "BOND FORFEITURE FEVER"

12 Mr. Rankin begins his Comment with some interesting
13 statistics. It is noted that for the six (6) year period
14 ending in 2012 Pima County garnered almost seven million
15 dollars (\$7,000,000) in bond forfeiture revenue--and
16 forfeited bonds at a ratio which exceeded 4-1. That is, for
17 every 5+ bonds in which a bond was either forfeited or
18 exonerated, the odds were overwhelming (better than 4 to 1)
19 that the bond would be forfeited (presumably in its
20 entirety). That falls within the Petitioner's definition
21 of "bond forfeiture fever," (c.f. Petition, page 12) even
22 if in the opinion of Mr. Rankin (Comment page 10), it does
23 not.

24 Neither the Petitioner nor the bonding community
25 in general takes issue with a forfeiture when the
26 defendant has truly absconded. Sadly, the statistics listed
27 do not reveal information which would have been
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4 particularly relevant to our discussion, such as, how many
5 cases involved defendants who truly absconded and were
6 not found, how many defendants were apprehended and
7 surrendered yet the bond was still completely forfeited, 1
8 and how many defendants were incarcerated in a sister state
9 and yet the bond was completely forfeited notwithstanding
10 the filing of an affidavit of surrender pursuant to
11 Criminal Rule 7.6(d)(2). 2

12 III
13 AS WITH THE COMMENT OF THE ARIZONA PROSECUTING
14 ATTORNEYS' ADVISORY COUNCIL (COUNCIL) PETITIONER
15 HAS PHILOSOPHICAL DIFFERENCES WITH MR. RANKIN,
16 WHICH PHILOSOPHY OF THE COUNCIL HE HAS ADOPTED

17 The next section of the Comment, entitled "Purpose and
18 Operation of Rules 7.6(c) and (d)" (c.f. Comment, pages
19 3-6) is similar to the philosophical argument advanced in
20 the Comment of the Arizona Prosecuting Attorneys' Advisory
21 Council, focusing on only one purpose of an appearance

22 1. By his own admission (Comment, pages 2-3) Mr. Rankin
23 indicates that Pima County does not operate as Petitioner
24 has alleged things are done in Maricopa County, that is, a
25 flat \$150 fee is charged when a defendant is apprehended
26 and surrendered by the bondsman prior to the entry of a
27 bond forfeiture judgment. (See Petition, pages 6-7).
28 Indeed, Mr. Rankin's position/philosophy was that as
espoused in the Campbell and Crayton cases c.f. Comment,
page 16, and see footnote 2, infra. He (now) seeks to
forfeit the entire amount of the bond in every case.

2. Discussed in footnote 5 of the Comment (page 16) are
two (2) cases involving post-violation incarceration-in-a
sister-state defendant. These cases will be discussed in
more detail infra.

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3 bond, to have the defendant appear at all proceedings, and
4 completely ignores another, and equally important purpose,
5 that of the encouragement of the bondsman for the
6 apprehension and surrender of the absconding defendant
7 State v. Vang, 763 N.W.2d 355, 358 (Minn. App. 2009).

8 As correctly pointed out in the Comment, even if
9 a surety does apprehend and surrender the defendant, this
10 guarantees absolutely nothing-State v. Old West Bonding
11 Company, 203 Ariz. 468, 56 P.3d 42 (Ct. of Appeals, Div. 1,
12 2002). Any relief from a potentially complete forfeiture of
13 the bond is left to the sole discretion of the trial judge.
14 As pointed out in the Petition, this current system is
15 simply not working as well as it should (c.f. Petition
16 pages 4-7). The bonding community has tried to live
17 solely with the changes to Criminal Rule 7.6 first adopted
18 in 1998, but realized further modifications were necessary
19 (c.f. Comment, page 8, Petition pages 1-2) given the
20 strident attitude/philosophy of certain Arizona
21 prosecutors.

22 IV
23 THE PETITION, IF ENACTED, WOULD BENEFIT THE
24 ENTIRE CRIMINAL JUSTICE SYSTEM, NOT JUST
25 THE BAIL BOND INDUSTRY

26 Mr. Rankin then laments (c.f. Comment, pages 6-8) that
27 if the changes to Criminal Rule 7.6 are enacted the sole
28 beneficiaries would be the "Bail Bond Industry." The "Bail

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3 Bond Industry" does not dispute that if the proposed
4 changes are enacted "a more level playing field" [c.f.
5 Reply to Comment of the Arizona Prosecuting Attorneys'
6 Advisory Council, page 11] will result. However, the
7 beneficiaries to such a "levelling" will not just be
8 the "Bail Bond Industry," it will be the entire Arizona
9 criminal justice system. As noted in State v. Old West
10 Bonding Company, 203 Ariz. 468, 475 56 P.3d 42, 49 (Ct. of
11 Appeals, Div. 1, 2002) one of the "relevant considerations"
12 for a court to consider when determining whether and in
13 what amount" to forfeit an appearance bond includes "(6)
14 the public's interest in ensuring a defendant's
15 appearance." 3, 4 By endeavoring to discourage bondsmen
16 from expending time and resources in connection with a
17 a post-violation apprehension and surrender because the
18 state/county has and will seek a complete forfeiture

19 3. As additional evidence of Mr. Rankin's turning to the
20 "dark side,"--of his desire to forfeit an entire bond
21 notwithstanding any of the circumstances, he has espoused
22 in his Comment (c.f. page 11) that the above cited
23 "relevant consideration" as well as those others listed in
24 State v. Old West Bonding Company, supra, are "dicta." Only
25 in Yavapai County has that ridiculous argument been
26 advanced before. Undersigned counsel criticizes Yavapai
27 County each time it has raised it, and Yavapai County has
28 yet never had success with it. Petitioner was critical of
Mr. Rankin when he raised it the Campbell matter and
remains critical of his complete misreading of State v. Old
West Bonding Company, supra, in this Reply.

4. For a more complete discussion of this public policy
argument see Petition, pages 9-12.

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2 of the bond, anyway, (which it has, most successfully, see
3 Comment, pages 1-2) this has and will most likely translate
4 to more absconding defendants being unapprehended and
5 remaining at large, notwithstanding a bondsman's
6 contractual obligation to the indemnitor and the State.
7 State of Kansas v. Sedam, 34 Kan.App.2d 624, 629, 122 P.3d
8 826, 831 (App. 2006). The litany of woes complained of
9 on page 7 of the Comment are, essentially "solved" if
10 the defendant is timely returned to custody--which the
11 State should encourage, and not discourage.

12 V
13 IF THE SYSTEM WORKED AS ALLEGED IN THE COMMENT
14 THERE WOULD HAVE BEEN NO NEED FOR THE PETITION

15 Mr. Rankin then begins "Part II of his Comment,"
16 (Comment page 8-10) by essentially saying, well, gee whiz,
17 since the courts can exercise their discretion pursuant to
18 State v. Old West Bonding Company, supra, what is the
19 Petitioner complaining about? The answer to that question,
20 as pointed out in the Petition and in the Replies to the
21 Comments of the Arizona Prosecuting Attorneys' Advisory
22 Council, the Maricopa County Attorney and the Maricopa
23 County Superior Court is that more often than not a court
24 merely gives "lip service" to State v. Old West Bonding
25 Company, supra, and at the behest of prosecutors like Mr.
26 Rankin and others of the Arizona Prosecuting Attorneys'
27 Advisory Council (whom successfully advocate the "strict
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2 liability" standard) and forfeit the entire bond, or
3 virtually the entire bond, notwithstanding an apprehension
4 and surrender. 5

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6 VI
7 CONTRARY TO THE ARGUMENT IN THE COMMENT THE PROPOSED
8 AMENDMENTS DO NOT IGNORE THE
9 PRIMARY PURPOSE OF THE BOND, NOR MANDATE
10 ABSOLUTION OF THE SURETY FROM LIABILITY
11 IN POST-VIOLATION SCENARIOS

12 Mr. Rankin begins the next facet of his Comment
13 (pages 11-14) with a continuation of the prior "gee whiz
14 the court can exercise discretion pursuant to State v. Old
15 West Bonding Company, supra" argument. Having already
16 dealt with that argument in this Reply, and in other
17 Replies on file herein, Petitioner will not dwell any
18 further on it, here, although it will be dealt with infra.

19 Commentor then endeavors to distinguish a pair
20 of sister state cases cited in the Petition, State v.
21 Amador, 98 N.M. 270, 648 P.2d 309. (S.Ct. N.M. 1982) and
22 State v. Storkamp, 656 N.W.2d 539 (S.Ct. Minn 2003).

23 5. Contrary to the representation of Mr. Rankin in
24 footnote 3 of his Comment, page 10, undersigned counsel has
25 never accused a trial judge, either in court or in the
26 Petition that he or she deliberately ignored a criminal
27 rule or, as importantly for our discussion, the holding of
28 State v. Old West Bonding Company, supra, for whatever
reason. Petitioner merely points out that in the scores of
cases undersigned counsel has been involved in concerning
the problems sought to be corrected by the contents of the
Petition, no judgment of the complete or virtually complete
forfeiture of a bond has ever been reversed by the Arizona
Court of Appeals, Division 1 and Division 2, because no
"abuse of discretion" has ever been "found."

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Those cases were cited as examples of jurisdictions and decisions which recognized that forfeiture of the entire bond because of incarceration in another state was an "abuse of discretion" (Amador) and that forfeiture of an entire bond after rapid apprehension and surrender by a bondsman was also an "abuse of discretion" and what was required was exoneration of the bond in full (Storkamp). Petitioner realizes that "the laws of other States, while helpful are not binding on (this court) Bunker's Glass v. Pilkington, PLC, 202 Ariz. 481, 491 paragraph 40, 47 P.3d 1119, 1129 (App. 2002) affirmed 206 Ariz. 9 (2003). Yet, nevertheless they (at least Amador) are examples of the "trend" in the law that incarceration in another jurisdiction no longer mandates complete forfeiture of a bond (See Petition, pages 10 and 11 citing Annotation 33 A.L.R. 4th 633 Bail, effect on surety's liability under bail bond under principal's incarceration in other jurisdiction. It is in recognition of this trend, and the failure of Arizona trial courts to follow such trend (although permitted to do so by the 1998 amendments to Criminal Rule 7.6) that the proposed amendments are submitted to "correct." As noted in the Petition (page 4 and 11-12) it has been the sad experience of Petitioner that trial courts rarely, if ever, give relief to a surety when a defendant is incarcerated in a sister

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3 jurisdiction, (either pursuant to Criminal Rule 7.6(d)(2)
4 or in light of State v. Old West Bonding Company, supra,)
5 but, rather, adhere to the notion that incarceration in
6 another jurisdiction is not a "valid explanation or excuse"
7 c.f. Criminal Rule 7.6(c)(2) and State ex. rel. Ronin v.
8 Superior Court, 96 Ariz. 229, 393 P.2d 919, (1964); State
9 v. Rocha, 117 Ariz. 294, 572 P.2d 122 (App. 1977); and
10 State ex. rel. Corbin v. Superior Court, 2 Ariz.App. 257,
11 407 P.2d 938 (1965). Petitioner stands by his
12 representations made in the Petition (page 2) that "old
13 habits" have been "too hard to break" and that trial
14 courts, therefore, must be forced by this court to
15 recognize and adhere to the modern trend in this area of
16 bond law by the adoption of the rule language suggested in
17 the Petition.

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19 VII
20 ADOPTION OF THE PROPOSED LANGUAGE OF
21 CRIMINAL RULE 7.6(d)(2)(a) AND 7.6(d)(2)(b)
22 IS GOOD PUBLIC POLICY

23 Mr. Rankin next turns in his Comment (c.f. pages
24 14-18) to an explanation why the adoption of the proposed
25 language of Criminal Rule 7.6(d)(2)(a) and 7.6(d)(2)(b)
26 is "bad public policy." We begin with a discussion of
27 proposed Rule 7.6(d)(2)(a). As indicated in the Petition
28 this change would "codify" the "unwritten policy" of

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3 Maricopa County to forfeit a flat \$150.00 when a
4 bondsman/surety successfully apprehended and surrendered a
5 defendant back into the County Jail. Before dealing
6 directly with Mr. Rankin's Comment and comments, Petitioner
7 wishes to point out that both the Maricopa County Attorney
8 and the Presiding Judge of the Maricopa County Superior
9 Court (on behalf of the Maricopa County Superior Court)
10 filed Comments to the Petition. However, neither
11 Commentor, each being in a perfect position to know and
12 challenge both the existence of the "unwritten policy"
13 and the represented good it has done for Maricopa County,
14 (c.f. Petition, pages 5-6)-yet neither Commentor challenged
15 the existence of the policy or claimed that the court
16 system would suffer if the policy were "codified." That
17 is why Mr. Rankin's challenge to proposed Rule 7.6(d)(2)(a)
18 rings so hollow.

19 Mr. Rankin then lists five (5) separate arguments/
20 reasons why the proposed rule changes are a "bad idea." He
21 begins (Comment, pages 14-15) by claiming that "such a
22 mechanism" would convert a bond with its pre-existing
23 contractual terms into a 'speculative ... bond,' "ignoring
24 the judicial determinations made in setting the bond."
25 However true that may be, one could make the same argument
26 about any bond in any bond forfeiture hearing. The rule, if
27 adopted would simply, under a specific set of
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3 circumstances, determine how much, albeit less than the
4 "face amount" of the bond, to forfeit.

5 Mr. Rankin then represents (Comment, page 15)
6 (Petitioner thinks) that through the proposed rule change
7 the surety "seek(s) a waiver of extradition." Commentor
8 goes on to complain that a surety "holds no party status
9 or authority in extradition proceedings, etc."
10 Petitioner confesses he does not understand the argument
11 because through the rule change the surety has offered to
12 compensate the state for the time and expense of arranging
13 for extradition. While it is true that a bondsman/surety
14 is in a position to exert pressure on a defendant to waive
15 extradition (especially if a defendant or close family
16 member has collateralized the bond, as is usually the
17 case,--and that in the cases wherein Petitioner has been
18 involved the defendant has generally waived extradition)
19 nevertheless, the rule seeks no such "waiver."

20 Mr. Rankin then laments in his footnote 5 on page
21 16 of his Comment that Pima County has "experienced harm"
22 in connection with two (2) bond forfeiture cases wherein
23 the defendants' whereabouts were known because of their
24 incarcerated status in a sister state. Petitioner can only
25 assume based on the "ferocious fight" Mr. Rankin put up
26 both in Campbell, (State v. Kenyatta Campbell,

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3 CR2011-1461-003) and in Crayton, (State v. Kory Crayton
4 CR2011-14789-001) 6 that the harm he complains of
5 (especially in Campbell, supra,) is the fact that
6 notwithstanding his lengthy Motion for Reconsideration,
7 seeking the court to "change its mind" and forfeit the
8 entire amount of the bond, when the court forfeited "only"
9 \$50,000.00 plus transportation costs, that because the
10 Court denied the Motion Pima County was "harmed." And
11 while it is true both in Campbell and Crayton their return
12 to Pima County will not necessarily be instantaneous,
13 nevertheless, they will be returned, and Mr. Rankin in his
14 Comment has indicated no "harm" to Pima County being able
15 to successfully prosecute the defendants, once returned.

16 As pointed out by Mr. Rankin in his Comment, the
17 "harm" was significantly less in Crayton. In that case
18 the amount of the bond exonerated, after payment of the
19 the court ordered transportation costs, will probably end
20 up being less than 15% of the face amount of the \$30,000.00
21 bond.

22 What Mr. Rankin demonstrates with his argument about
23 Campbell and Crayton is that only in the most rare of

24 6. Indeed, the Comment is a testament to Mr. Rankin's
25 "ferocity." Not only did he use every line permitted in
26 connection with the length of the Comment (Arizona Rules of
the Supreme Court,) Rule 28D, but the Comment, unlike any
other Comment filed, exceeded the length of the Petition.

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3 occasions, and only after a protracted fight, can a
4 bondsman/surety hope to pay anything less than a full
5 forfeiture of a bond. And, if Crayton demonstrates a
6 "trend" as Mr. Rankin seems to indicate that it will,
7 the amount forfeited will still be in the 85-90% range.
8 At this point Petitioner wishes to remind the Court that,
9 as pointed out in State v. Amador, supra, 98 N.M. at 273,
10 648 P.2d at 312:

11 Bail is not a source of revenue
12 for the State. (emphasis added).
13 The purpose of a bond or security
14 is to secure a trial, its object
15 being to combine the administration
16 of justice with the convenience of
17 the person accused, but not proved
18 guilty. If the accused does not
appear the bail may be forfeited
not as punishment to the surety or
to enrich the Treasury of the State
but as an incentive to have the
accused return or be returned to the
jurisdiction of the court. (emphasis
added.)

19 Accord: State v. Darwin, 70 Wash.App. 875, 877, 856 P.2d
20 401, 403 Wash. App. Div. 1, 1993 citing State v. Jackshitz
21 75 Wash. 253, 136 P. 132 (1913) "Bail is not a revenue
22 measure in lieu of a fine or a method to punish sureties."
23 By not adopting the proposed rule changes, the court will
24 perpetuate this bad public policy of rewarding counties
25 for their greed and intransigence; allowing them to not
26 only get the defendant (back) but also most if not all
27 of the bond money. That is unfair, wrong and bad public
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3 policy.

4 Mr. Rankin, in his "third argument" (also on page
5 16 of his Comment) then turns his attention back to
6 attacking proposed Rule 7.6(d)(2)(a). Mr. Rankin
7 essentially claims that just because the \$150.00 "flat rate
8 forfeiture" when there has been a timely apprehension and
9 surrender works in Maricopa County, codifying this practice
10 is "ill advised." Why is it "ill-advised"? Not because
11 it doesn't work in Maricopa County, but because it will
12 cost Pima County money. Mr. Rankin doesn't phrase his
13 opposition that way, but that is the bottom line.

14 Mr. Rankin's fourth argument (Comment, page 16 and
15 17) is a justification for the position of a complete
16 forfeiture of a bond even in the case of apprehension and
17 surrender, citing, as did the Council, State v. Donahoe,
18 220 Ariz. 126, 203 P.3d 1186 (App. Div. 1, 2009). As
19 indicated in the Reply to the Council's Comment (c.f.
20 pages 4-7) such reliance on Donahoe, supra was completely
21 misplaced, as it is in Mr. Rankin's Comment.

22 Mr. Rankin's fifth and final argument (c.f. Comment,
23 pages 17 in that facet of his Comment is another of his
24 "gee whiz" arguments. Mr. Rankin claims no changes ought
25 be made since "the policy of encouraging sureties to
26 remand defendants "already exists." Petitioner supposes
27 the obviously simple answer is, yes, but because of
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prosecutors like Mr. Rankin and his ilk, fighting to
forfeit entire bonds notwithstanding such "remand"
the policy exists in name only, and not in application.

VIII
THE PROPOSED LANGUAGE OF CRIMINAL RULE 7.6(c)(1)
SHOULD BE ADOPTED

Mr. Rankin concludes his Comment (c.f. Comment, pages
18-20) with an argument against the adoption of the
changes suggested in the Petition about when the notice
should be sent and what the timeframe for the hearing ought
to be. Mr. Rankin, not surprisingly, solely relies on the
experiences of Pima County as examples of why the system
does not need changing. Actually, in this area Petitioner
and Mr. Rankin are in agreement. Pima County does a good
job in these areas. Sadly, the same cannot be said for
her sister counties in Arizona, and it is for that reason
the suggested changes have been made.

Respectfully submitted this 10th day of June, 2013.



Clifford Sherr
Attorney at Law
Petitioner

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Copy of the foregoing
mailed/delivered this
13th day of June, 2013 to:

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Clifford Sherr